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IN THE

Supreme Court of the United States

October Term, 1951

No. [redacted] 108

WALTER ELLSWORTH BREHM,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Walter Ellsworth Brehm, the above-named petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, its No. 11,178, affirming the judgment of conviction and the sentence imposed upon petitioner in a criminal cause in the United States District Court for the District of Columbia. The judgment was entered on April 24, 1952 (R. 166),

and said Court stayed the issuance of its' mandate by orders dated May 12 and May 27, 1952.

SUMMARY STATEMENT OF MATTERS INVOLVED

Petitioner was indicted and tried in the District Court for violations of Section 208 and 209, Title 18, United States Code, 1940 Edition. The indictment, containing seven counts, charged violations of Section 208 in Counts I and III to VII, inclusive, and a violation of Section 209 in Count II (R. 2-8).

All of the counts allege that the petitioner, while a Representative in Congress, unlawfully received specified contributions for the political purpose of assisting in financing his campaign for reelection as a Representative. Count I charges that a contribution was received by petitioner on December 23, 1947, from Clara Soliday, then employed as a clerk in his office. Count II asserts that petitioner received a contribution from Clara Soliday on February 3, 1948, in the Old House Office Building. Counts III through VII charge petitioner with having received contributions on designated dates in the year 1948, from Emma S. Craven, while she was employed as a clerk in his office. Although it was alleged in all counts except Count II that petitioner directly and indirectly received the contributions, the bill of particulars filed by respondent asserted that the contributions were directly received (R. 18).

At the close of the Government's case, the Trial Court granted petitioner's motion for a judgment of acquittal as to Count I (R. 118). The jury returned a verdict of not guilty as to Count II (R. 159). The petitioner was convicted upon Counts III through VII and was sentenced to pay a fine of $5000.00, and to serve a term of 5 to 15 months, which imprisonment was suspended with petitioner being placed on probation.

I

The Trial Court permitted the Government, over objection of petitioner, to introduce evidence of offenses not alleged in the indictment and which had no connection with the offenses therein charged (R. 51). Also, over objection, the prosecutor was allowed to cross examine petitioner regarding these prior offenses and to make reference thereto in the opening statement (R. 51, 57). This evidence introduced through Clara Soliday, covered payments which she testified were made to petitioner monthly during the period of employment in his office in the years 1945, 1946 and 1947 (R. 62-64), although the date of the earliest offense charged in the indictment is December 23, 1947 (R. 2-8). After petitioner's motion for judgment of acquittal was granted as to Count I, the earliest date of an offense was February 3, 1948.

Mrs. Soliday's testimony clearly reveals that it had no connection with the offenses charged in respect to the crucial point in issue here, namely, the purpose of the payments. She testified that nothing was said by petitioner and herself as to the purpose for her paying the money over and she did not know for what purpose she was paying it; she supposed that the balance left to her was as much as she was worth, and it was more than she had received in her previous employment (R. 63). At another point Mrs. Soliday said there was no understanding between herself and petitioner as to the purpose; that she did not know what the payments were for and had no idea as to their purpose (R. 65). In contrast to this testimony is the allegation made in each count, that the contributions were received for the purpose of assisting in financing petitioner's campaign for reelection. With no connection existing between Mrs. Soliday's testimony as to payments made and the violations for which petitioner was tried, he submits that the Trial Court

erred in permitting such evidence to be received. Petitioner contends that the prejudicial effects produced upon the minds of the jurors by the impact of this evidence seriously jeopardized his substantial rights to a fair trial.

In argument before the Trial Court, on the admissibility of this evidence, the Government prosecutor stated that this was a conspiracy case (R. 41); and again, that the purpose for introducing it was to show that "here was a conspiracy which began in January, 1945, and continued down to the time when each of these women left his employ" (R. 47). It may be observed however, that the indictment does not allege a conspiracy, nor interrelated or connecting offenses. The furthest extent to which it goes, is to charge offenses which are of a similar nature.

II

Except as to Count I, the Trial Court denied petitioner's motions for judgment of acquittal as to all counts, made at the close of the Government's case (R. 118), and at the conclusion of all the evidence (R. 150). These motions were predicated upon the failure of the Government to prove that the contributions referred to in the indictment were received by petitioner for the purpose of assisting in financing his campaign for reelection. The prosecutor conceded that if the petitioner received the money for the political purposes of the national committee or the state committee, that receipt would not be a violation charged in the indictment (R. 153). Likewise, the Court instructed the jury that the political purpose charged was an essential allegation which the Government must prove beyond a reasonable doubt (R. 158).

In relation to Counts III through VII, Mrs. Craven testified concerning her conversations with petitioner and as to her placing money in an envelope each month, for a number of months in 1948, and on each occasion, of

turning it over to petitioner. Mrs. Craven told him she would be willing to donate to the Republican campaign fund (R. 74). "He said not one cent of it would go back to him; ....." (R. 75). "He didn't say to his personal campaign; he said to the Republican campaign." She thought it was all right to contribute to the national campaign (R. 83). Mrs. Craven wrote a letter to petitioner dated December 7, 1948, which stated in the first paragraph that she was giving an "itemized statement because the Republican Committee might wish to see it" (Govt. Ex. 17, R. 25-28). In testifying regarding this letter, she said in referring to a column of figures listed under the heading, "Amount Paid", "That was the amount I paid to the Republican Committee for the campaign fund" (R. 80).

Mrs. Craven was the nominal secretary of the Brehm for Congress Committee in 1948. However, she testified that she had nothing to do with the expenditures of the money listed in the Brehm for Congress Committee report, and she at no time had in her possession, nor did she receive or disburse any of the money listed in that report (R. 81, 82).

Mrs. Craven's testimony expressly negatives any possibility of her having made contributions for petitioner's personal campaign as charged in the indictment. Therefore, it is submitted that the record contained no evidence from which the Trial Court might fairly have concluded that the contributions were for the purpose charged in the indictment. Hence, petitioner makes the contention that with no issue of fact to be decided by the jury with respect to this essential allegation, its verdict could have been based only on conjecture and speculation. Petitioner accordingly asserts that the Trial Court should have granted his motion for a judgment of acquittal.

III

Prior to the trial, petitioner filed a motion to dismiss the indictment (R. 9, 10), which was denied (R. 10, 11). One of the grounds urged for dismissal was that the Grand Jury which returned the indictment was not drawn, selected and impaneled in accordance with law. The statute creating the jury commission provides for three commissioners and sets forth that their appointments shall be rotated, with the term of one commissioner expiring each year. It also states that each commissioner shall take the prescribed oath before entering upon the discharge of his duties, and that the commission shall act as a body, except when one of the commissioners is unable to perform his duties because of illness, absence or other inability.

The record shows that the terms of the two commissioners, who selected the grand jury which returned the indictment in this case, were not rotated; that due to improper spacing of appointments, both of them were appointed for a second term in the same year; that neither took the required oath of office under the renewal appointment, and that, although the Jury Panel was drawn by only two commissioners, the non-participation of the third was not properly accounted for (R. 12-17).

It is petitioner's contention that the statute creating the Jury Commission, by established principles of law, must be strictly followed. It is obvious that its provisions were violated in three respects. Hence, the Grand Jury selected was an invalid body, and the indictment it returned was accordingly void.

QUESTIONS PRESENTED

1. The first question is whether the Trial Court committed error in receiving evidence against petitioner of offenses not charged, where all of the violations are of a similar nature, and intent, motive and identity of petitioner are not in issue, and where the evidence received has no connection with the offenses alleged in the indictment.

2. The second question is, whether in a trial upon an indictment in which all counts charge petitioner with having received contributions for the political purpose of assisting in financing his campaign for reelection as Representative in Congress, and where the prosecutor conceded that the receipt by petitioner of a contribution for the political purposes of the national or state committee would not be a violation of this indictment, the Trial Court should have granted petitioner's motion for judgment of acquittal when the Government failed to prove that any of the contributions were received for the political purpose charged.

3. The third question is, whether an indictment is invalid, which is returned by a Grand Jury selected by Jury Commissioners who did not take oaths on being reappointed for renewal terms and whose appointments were not rotated, and where two of the three Jury Commissioners selected the Grand Jury with no satisfactory explanation of the absence of the third commissioner having been made, when such actions of the commissioners are contrary to the provisions of the statute creating the Jury Commission.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. With respect to the question presented as to the admissibility of evidence of prior offenses,—

(a) The United States Court of Appeals for the District of Columbia Circuit has not given proper effect to the decision of this Court in the case of *Boyd v United States*, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; and,

(b) The opinion of the Court below is in conflict with the decision of the Fifth Circuit in the case of *Railton v United States*, 127 F. (2d) 691, and with that of the Eighth Circuit in *Kempe v United States*, 151 F. (2d) 680.

2. With respect to the question presented as to the error of the Trial Court in refusing to grant petitioner's motion for judgment of acquittal, upon the Government's failure to prove that the contributions were received for the political purpose charged in the indictment,—

(a) The United States Court of Appeals for the District of Columbia Circuit has not given proper effect to the decisions of this Court in the cases of *Ex Parte Curtis*, 106 U. S. 371, 1 S. Ct. 381, 27 L. Ed. 232, and *United States v Wurzbach*, 280 U. S. 396, 50 S. Ct. 167, 74 L. Ed. 508; and,

(b) The opinion of the Court below is in conflict with the circuit court decision in the case of *United States v Scott*, 74 Fed. 213.

3. With respect to the question presented as to the invalidity of the indictment,—

(a) The United States Court of Appeals for the District of Columbia Circuit has decided a question

of substance, namely, whether it is a violation of petitioner's Constitutional rights to be forced to trial in a criminal cause on an indictment that has been returned by a Grand Jury selected by an invalid Jury Commission, without being required to allege and prove prejudice. This question has not been, but should be decided by this Court; and,

(b) The opinion of the Court below is in conflict with the decision of the Fifth Circuit in the case of *Dunn v United States*, 238 F. 508.

Wherefore, it is respectfully prayed that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that Court to certify and send to this Court for its review and determination, a full and complete transcript of the record and proceedings in the case at bar, its Number 11,178, and that the judgment of said United States Court of Appeals for the District of Columbia Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper.

And your petitioner will ever pray.

WALTER ELLSWORTH BREHM,
Petitioner

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not been officially reported, but it will be found at pages 161-165 of the record.

II

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code (c. 646, 62 Stat. 928). The judgment of the United States Court of Ap-

peals for the District of Columbia Circuit was entered April 24, 1952 (R. 166), and no rehearing was prayed for.

III

A full statement of the case is included in the petition.

IV

STATUTES INVOLVED

Section 208, Title 18, United States Code, 1940 Edition (c. 27, 22 Stat. 406; c. 321, 35 Stat. 1110; c. 368, 43 Stat. 1073):

> "It is unlawful for any —— Representative in —— Congress, —— or any officer or employee of the United States, —— to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any —— contribution for any political purpose whatever, from any other such officer, employee, or person."

Section 209, Title 18, United States Code, 1940 Edition (c. 27, 22 Stat. 407; c. 321, 35 Stat 1110):

> "No person shall, in any —— building occupied in the discharge of official duties by any —— employee of the United States ——, solicit in any manner whatever or receive any contribution of money —— for any political purpose whatever."

Section 1401, Title 11, D. C. Code, 1940 Edition, as amended (c. 854, 31 Stat. 1222; c. 153, 41 Stat. 558; c. 881, 60 Stat. 931):

> "There shall be, and there is hereby, constituted a jury commission for the District of Columbia, which shall be composed of three commissioners, ———. Such commissioners —— shall serve for a term of three years and until their successors are appointed and qualified; except that the members first ap-

pointed shall serve for one, two and three years, respectively ——. Before entering upon the discharge of their duties they shall each take an oath of office to be prescribed by the District Court ——. It shall be the duty of said jury commission to make and preserve a record of the list of names of jurors both grand and petit —— to place the names in the jury box, and to have custody and control of said jury box, and to draw the names of said jurors— from time to time, as hereinbefore provided ——. In the event of illness or other inability or absence from the District of Columbia of any one of said commissioners, the other two commissioners may perform the duties of said jury commission."

V

SPECIFICATIONS OF ERRORS INTENDED TO BE URGED

(1) The United States Court of Appeals for the District of Columbia Circuit erred in holding that the Trial Court properly permitted the introduction of evidence against petitioner of offenses not alleged in the indictment and which had no connection with the offenses therein charged.

(2) The United States Court of Appeals for the District of Columbia Circuit erred in holding that the Trial Court's ruling, which denied petitioner's motion for a judgment of acquittal, was correct, where the Government failed to prove that the contributions referred to the indictment were received by petitioner for the purpose of assisting in financing his campaign for reelection as therein charged.

(3) The United States Court of Appeals for the District of Columbia Circuit erred in failing to hold that the indictment was void by reason of the invalidity of the Jury Commission, and that petitioner's Constitutional rights were thus violated.

ARGUMENT

I

The Court below erred in holding that evidence against petitioner of prior offenses not alleged in the indictment and which had no connection with the offenses therein charged was admissible.

The United States Court of Appeals for the District of Columbia Circuit upheld the Trial Court's ruling on the admissibility of evidence of prior offenses. The Court observed in its opinion that one of the exceptions to the rule forbidding evidence of other offenses is that "such evidence may be admitted to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose or in pursuance of a single object" (R. 165). In support of its position the Court below cited *Bracey v United States*, 79 U. S. App. D. C. 23, 142 F. (2d) 85, cert. denied 322 U. S. 762.

Petitioner contends however, that the evidence introduced through Mrs. Soliday does not come within the quoted exception. It may be noted that Mrs. Soliday testified that no understanding existed between herself and petitioner as to the purpose of the contributions which she said she gave to him each month during the years 1945, 1946, and 1947; that she did not know what the payments were for and had no idea as to their purpose. It is clearly evident that her testimony does not prove a common scheme or purpose nor is it connected with a single purpose or in pursuance of a single object, within the range of the violations charged in the indictment. It is submitted that the Government's proof falls short of meeting these requirements because it fails to establish that the contributions testified to by Mrs. Soliday were for the political purpose charged in the indictment. Yet, her extensive testimony, recounting a long series of contributions, must have poisoned the minds of

the jurors on the charges against petitioner thereby producing a prejudicial result.

Petitioner makes the further contention that the Trial Court's ruling which permitted Mrs. Soliday's testimony of prior offenses to be received and the affirmance of such action by the Court below does not give proper effect to the decision of this Court in *Boyd v United States*, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077. In that case, evidence of several robberies by the defendants, who were charged with murder, was allowed to be introduced. In reversing the judgment of conviction, this Court observed, at page 458, that evidence of the robberies was

> "collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. ——. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, ——".

Petitioner asserts that the decision of the Court below is in conflict with the holdings in the cases of *Railton v United States*, 127 F. (2d) 691 (5th Cir. 1942), and *Kempe v United States*, 151 F. (2d) 680 (8th Cir. 1945), on the issue of the admissibility of evidence of other offenses. The opinions in both of these cases are consistent with the principles announced in the *Boyd* case, supra.

In the *Railton* case, the judgment was reversed on a count charging conspiracy to steal. The Government sought to have the evidence in question held admissible under the "system or plan" exception to the general rule. In reviewing the testimony, the Court observed that: "Some of the collateral transactions are so closely related to the taking of the fire clay in time, in circumstances, and persons concerned, as to be fairly illustrative of a conspiracy among them to steal" park materials including

this clay. It was noted however, at page 693 of the decision, as follows:

> "But there is in this case no question of motive or intent to be illustrated, no claim of a mistaken taking to be rebutted, ——. Nor is there any peculiarity of method which might identify him as a perpetrator, which is the usual ground of admitting other transactions in which the accused was clearly or admittedly guilty, as showing system. ——. We do not think it had such a connection with the matter on trial as to justify its injection."

In the *Kempe* case, supra, the defendant was charged with illegal sales of gasoline in violation of the Second War Powers Act of 1942, as amended. Evidence was introduced at the trial of illegal sales of gasoline which had taken place prior to the sales charged and of defendant's conversations concerning such prior sales. The Court, in holding that the admission of such evidence constituted reversible error, noted at page 688, that the

> "testimony relating to conversations with the defendant referred, not to any act charged in the information, but to separate and independent transactions, although such transactions were similar to the ones charged to have been committed by the defendant. Likewise, the evidence of sales in the months preceding October, 1944, tended to show that the defendant was guilty of offenses separate and distinct from the ones charged in the information. The prior offenses, if any, were not connected with the offenses for which the defendant was on trial. The fact that the other offenses were of a like nature and were offenses against the same statutes was not competent to prove that the defendant committed the acts charged in the information."

In concluding, the Court observed in the *Kempe* case, at page 689, that—

> "It is neither competent, fair, nor just to a defendant to receive evidence against him of like of-

> fenses to those charged in the indictment under which he is on trial where no question of his intent is in issue and no connection between such offenses and those charged is proved."

The Court below relied upon its decision in the earlier case of *Bracey v United States,* supra, as the authority for ruling the collateral evidence of Mrs. Soliday to be admissible. In the *Bracey* case, where the appellant was charged with a sexual offense, the Court below stated the evidence there in question was admissible under "another well recognized exception to the general rule", having reference to that applicable in sex offender cases. Petitioner submits that the circumstances of his case are not within the bounds of such exception, and that accordingly, the Court's ruling in the *Bracey* case should not control the issue involved here. Rather, it is petitioner's contention that the facts of his case are comparable to those of the *Railton* and *Kempe* cases, supra, and that the holdings therein are consistent with that of the *Boyd* case.

Petitioner takes the position therefore, that the Court below has not given proper effect to the *Boyd* case, and that a conflict exists between its decision herein, and those of the Fifth and Eighth Circuits, which petitioner urges should be resolved by this Court.

II

The Court below erred in holding that petitioner's motion for judgment of acquittal was properly denied where the Government failed to prove that the contributions specified in the indictment were received by petitioner for the purpose of assisting in financing his campaign for reelection as charged.

The Court below regarded the evidence to be in conflict on the question of whether or not the Government had proved that the contributions specified in the indictment were received by petitioner for the purpose of assisting

in financing his campaign for reelection and thus held that it was properly for submission to the jury. In concluding on this issue, the Court observed, as follows:

> "The jury might reasonably have concluded from this evidence that Brehm received the money from Mrs. Craven and that in doing so he had in mind his own campaign for reelection and not some other political purpose unconnected with himself" (R. 164).

Petitioner contends that the evidence in the record does not suggest the conflict noted by the Court below on the question of the political purpose for which the contributions charged in the several counts were received. Rather, petitioner submits that the direct, positive and uncontroverted testimony of Mrs. Craven is that she was contributing to the Republican Campaign fund. Her oral testimony was confirmed in document form as well, through her letter of December 7, 1948, Government Exhibit 17. In referring to a column of figures in that letter, which covered all of the contributions charged in the 5 counts on which petitioner was convicted, she said: "That was the amount I paid to the Republican Committee for the campaign fund".

Petitioner makes these further observations on the evidence in view of the Court's holding that the jury could reasonably conclude from petitioner's receipt of the money from Mrs. Craven that "he had in mind his own campaign for reelection and not some other political purpose". Mrs. Craven's testimony sets forth not only her side of the conversations with petitioner but his as well. What was in the petitioner's mind as to political purpose is best exemplified by Mrs. Craven's account of their conversations when she testified as follows: "He said not one cent of it would go back to him,——". "He didn't say to his personal campaign; he said to the Republican campaign". It is submitted that her testimony in this respect coalesces with her other statements, all of

which indicate that it was her avowed purpose to contribute to the Republican Committee for the campaign fund and not to petitioner's personal campaign.

The Court below discussed a statement of petitioner taken from his grand jury testimony, which the Government introduced at the trial. This statement, describing a conversation of Mrs. Craven with petitioner, made at the time she approached him with a sealed envelope, shortly after being employed in his office, was as follows:

> "I know you got a tough district. I know you haven't got any patronage. I know the Republican Party has been out of power. I like my job. I am so grateful to you for getting me back on the Hill I'd like to do something, help out the party—" (R. 163).

It is submitted that the quoted statement parallels Mrs. Craven's other testimony, denoting that her purpose was to help the party and not petitioner's personal campaign. Moreover, it may be observed that Mrs. Craven was not questioned as to the "tough district" in the course of her examination at the trial. While in point of time, she testified prior to the introduction of petitioner's grand jury testimony, as part of the Government's case, presumably such latter testimony, containing the statement as to the "tough district", was known to the Government prosecutor before Mrs. Craven was called as a witness.

Petitioner takes the position that the "tough district" statement pales into insignificance in view of Mrs. Craven's positive and direct testimony, particularly, since she expressly negatived having made contributions to petitioner's personal campaign. It is submitted also, that the other evidence reviewed in the decision of the Court below on this issue is not inconsistent with Mrs. Craven's express purpose in making the contributions.

Petitioner urges that the holding of the Court below with respect to the evidence on this issue produces a conflict with the principle of construction set forth in the case of *United States v Scott,* 74 Fed. 213 (1895). In that case, the late Chief Justice Taft, while a Circuit Judge, stated at page 218, in an analysis of an indictment making charges similar to those involved here, as follows:

> "To charge a man with soliciting a contribution from United States officers for a political purpose carries with it by implication a charge that the accused knew the purpose for which the contribution was solicited. The words 'for a political purpose' may reasonably be construed to qualify not only the contribution but the solicitation. Similarly, to charge that a man received from another his contribution for a political purpose, by implication charges that the reception was for the same purpose as the contribution; ——".

The decisions of this Court in the cases of *Ex Parte Curtis,* 106 U. S. 371, 1 S. Ct. 381, 27 L. Ed. 232 (1882), and *United States v Wurzbach,* 280 U. S. 396, 50 S. Ct. 167, 74 L. Ed. 508 (1930), hold this statutory provision is to protect Federal employees from solicitation for political purposes. These cases, which are fully consistent with the views expressed in the *Scott* case, afford a sound basis for concluding that a person under solicitation must be aware of the purpose thereof.

It is submitted that Mrs. Craven knew and understood the reasons for the solicitation here in question. Equally well, her testimony convincingly points out that both she and petitioner knew and understood the purpose for which the contributions were being received, and to paraphrase the Scott case, it is submitted that the reception was for the same purpose as the contributions. Giving Mrs. Craven's testimony the full weight to which it is entitled in the posture the case

assumes on this point, it is clear that the contributions referred to in Counts III through VII were received for the purpose of the Republican campaign fund, which the Government conceded would not be a violation charged in this indictment.

Petitioner accordingly contends that the decision of the Court below fails to give proper effect to the opinions in the *Curtis* and *Wurzbach* cases, and conflicts with the holding in the case of *United States v Scott,* supra.

Petitioner therefore urges the intervention of this Court to resolve the conflict.

III

Petitioner's Constitutional rights were violated because the Jury Commission which selected the Grand Jury that returned the indictment against him was illegally constituted, the members thereof having failed to meet the requirements of the statute creating said commission, and the indictment being thus void, petitioner was not required to show that he was prejudiced as a condition to attacking it.

The statute creating the Jury Commission and fixing its duties and the required method of operation appears in Section IV of this brief.

Prior to the trial petitioner filed a Motion to dismiss the indictment. Among the grounds urged for dismissal were that (1) the names of the Grand Jurors who returned the indictment were drawn and selected by two Jury Commissioners rather than three, as required by law; (2) the two Jury Commissioners who purported to act were not legally appointed and qualified because (a) they had not taken the oath of office as prescribed by the statute, and (b) the terms of office for which each Commissioner was appointed were not in accordance with the law.

The Trial Court denied the Motion to dismiss, and the Court below upheld this action relying upon its recent decision in the case of *Collazo v United States,* ..... U. S. App. D. C. ....., ... F. (2d) ..... (1952), wherein the same point had been raised. In the Collazo opinion, the Court stated, with reference to the failure of the two Commissioners to renew their oaths upon reappointment; "Probably a better procedure would be to renew the oath upon each reappointment, but a failure to do so is not such an omission as would invalidate all subsequent acts of the commissioners".

The Court below also considered the question in the Collazo case, as to whether prejudice had to be shown, and stated, as follows:

> "We further observe that no allegation is made, or could be made under the circumstances, that appellant was prejudiced in any respect by the drawing of the grand jury by these particular commissioners. Appellant attempts to distinguish the *Agnew, Medley* and *Romney* cases on the ground that those cases relate to irregular performance of their duties by duly-appointed commissioners and do not govern the case of irregularity in the selection of the jury commissioners. He contends that in the latter case prejudice to the defendant need not be shown. He cites *Dunn v United States,* in support of that contention. The *Dunn* case was expressly not followed in the well-considered case of *Brookman v United States,* and, like the Eighth Circuit, we find it not persuasive especially in view of Rule 52 (a)".

The case of *Dunn v United States,* 238 F. 508 (5th Cir. 1917) is authority for the proposition that statutes relating to Jury Commissioners must be strictly followed. In the *Dunn* case, the Court quoted with approval from *United States v Murphy,* (D. C.), 224 Fed. 554, 564 (1915), stating as follows:

> "The law has specified who is to make the selection of jurors, and it is unsafe and unwise to permit a

> departure from its provisions. Courts cannot stop to inquire in each case whether such participation, however indirect, has been harmful in a given case. The only safe rule is to prohibit and condemn it absolutely."

In the *Dunn* case, the Court concluded, at page 512, with the following language:

> "The Court is not vested with a discretionary power to dispense with a compliance with an essential feature of a safeguard prescribed by law."

The same reasoning is followed in the case of *Morris v United States,* 128 F. (2d) 912 (5th Cir. 1942), cert. denied, sub. nom., *Lacy v United States,* 317 U. S. 661. Authority for this proposition is also found in *State v Muldoon,* 67 Rh. I. 80, 20 A. (2d) 687 (1941); *Enloe v State,* 141 Tex. Cr. R. 602, 150 S. W. (2d) 1039 (1941), and *Martinez v State,* 134 Tex. Cr. R. 180, 114 S. W. (2d) 874 (1938).

Petitioner contends that the statute not having been complied with in the selection of the Grand Jurors, a valid indictment could not have been returned because de facto Grand Juries are not recognized by the Federal Courts. See *United States v Johnson,* 123 F. (2d) 111 (7th Cir. 1941), reversed on other grounds, 319 U. S. 503.

Concededly the statute was not followed in this case in that (1) the Commissioners had not taken the required oath of office, (2) the appointments were not rotated in accordance with the statute, and (3) the non-participation of the third member of the Commission was not adequately excused.

In the *Collazo* case, the Court below resolved the conflict between the *Dunn* case and the holding in *Brookman v United States,* 8 F. (2d) 803 (8th Cir. 1925), in favor of the latter. It is contended however, that with a conflict on this important Constitutional principle between

the two Federal Circuits, the intervention of this Court to settle the conflict would seem to be desirable and appropriate.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the Writ of Certiorari should be granted and that this Court should reject the judgment of the United States Court of Appeals for the District of Columbia Circuit in the case at bar and, finally, reverse it.

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